89-401

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In the Supreme Court of the United States

October Term, 1990

CYRIL H. WECHT, President of the Allegheny County Board of Prison Inspectors and the other members of the Board; THOMAS FOERSTER and WILLIAM H. HUNT, Commissioners for Allegheny County; FRANK J. LUCCHINO, Controller for Allegheny County, EUGENE COON, Sheriff for Allegheny County; THE HONORABLE PATRICK R. TAMILIA, MICHAEL J. O'MALLEY and MARION K. FINKELHOR, Judges Court of Common Pleas of Allegheny County; RICHARD S. CALIGUIRI, Mayor of the City of Pittsburgh; HARRIET McCRAY; Monsg. CHARLES OWEN RICE and CHARLES KOZAKIEWICZ, Warden of the Allegheny County Jail, and WILLIAM B. ROBINSON, Executive Director of Prison Inspectors, and CYRIL WECHT, THOMAS FOERSTER and WILLIAM H. HUNT, as Commissioners of Allegheny County,

Petitioners,

vs.

INMATES OF THE ALLEGHENY COUNTY JAIL, THOMAS PRICE BEY, ARTHUR GOSLEE, ROBERT MALONEY, and CALVIN MILLIGAN, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a federal district court in tailoring an equitable remedy for constitutional violations found to exist in a county jail exceeds the bounds of its remedial authority in ordering the closing of the existing jail and the submission of a plan for the construction of a new jail.

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No. _____

CYRIL H. WECHT, President of the Allegheny County Board of Prison Inspectors and the other members of the Board; THOMAS FOERSTER and WILLIAM H. HUNT, Commissioners for Allegheny County; FRANK J. LUCCHINO, Controller for Allegheny County, EUGENE COON, Sheriff for Allegheny County; THE HONORABLE PATRICK R. TAMILIA, MICHAEL J. O'MALLEY and MARION K. FINKELHOR, Judges Court of Common Pleas of Allegheny County; RICHARD S. CALIGUIRI, Mayor of the City of Pittsburgh; HARRIET McCRAY; Monsg. CHARLES OWEN RICE and CHARLES KOZAKIEWICZ, Warden of the Allegheny County Jail, and WILLIAM B. ROBINSON, Executive Director of Prison Inspectors, and CYRIL WECHT, THOMAS FOERSTER and WILLIAM H. HUNT, as Commissioners of Allegheny County,

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INMATES OF THE ALLEGHENY COUNTY JAIL, THOMAS PRICE BEY, ARTHUR GOSLEE, ROBERT MALONEY, and CALVIN MILLIGAN, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The County of Allegheny, Prison Board, and members thereof (hereinafter "County officials") respectfully pray that a writ of certiorari issue to review the decision of the

United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 4, 1989. In that decision, a panel of the Third Circuit affirmed the judgment of the United States District Court for the Western District of Pennsylvania and held that it was within the remedial authority of the District Court to order the closing of the Allegheny County Jail (hereinafter "County jail") and to require the submission of a plan for the construction of a new jail.

OPINIONS BELOW

The opinion and order of the United States Court for the Western District of Pennsylvania dated November 17, 1988, is officially reported at 679 F.Supp. 1137 (W.D.Pa. 1988) and appears as Appendix A ("App. A") hereto. The decision of the United States Court of Appeals for the Third Circuit, which affirmed the decision of the District Court, is officially reported at 874 F.2d 147 and appears as Appendix B ("App. B") hereto. The order of the United States Court of Appeals for the Third Circuit dated June 7, 1989 which denied the County officials' petition for rehearing before the Court *in banc* is not officially reported and appears as Appendix C ("App. C") hereto.

JURISDICTION

The judgment of the panel of the Third Circuit Court of Appeals was entered on May 4, 1989. The order of the Third Circuit denying the County officials' petition for rehearing before the Court *in banc* was entered on June 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Prohibition of Cruel and Unusual Punishment contained in the Eighth Amendment and the Due Process Clause of Section 1 of the Fourteenth Amendment.

The Eighth Amendment states:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. VIII.

The Due Process clause of Section 1 of the Fourteenth Amendment states:

> " . . . ; nor shall any state deprive any person of life, liberty or property, without due process of law; . . . "

U.S. Const. Amend XIV.

STATEMENT OF THE CASE

This case arises out of litigation that has been ongoing for the last 13 years between County jail inmates and the County officials concerning the conditions of confinement in the County jail.

In 1976 a class action was filed under 42 U.S.C. §1983 and 28 U.S.C. §1343(3) on behalf of past, present and future inmates at the County jail against the County officials. The lawsuit alleged that conditions at the County jail violated the inmates' constitutional rights and it sought declaratory and injunctive relief. After a trial, the District Court found that the inmates' constitutional rights were being violated by the conditions of confinement at the County jail and granted injunctive relief to correct the deprivations. *Owens-el v. Robinson*, 442 F.Supp. 1368 (W.D.Pa. 1978), *Owens-el v. Robinson*, 457 F.Supp. 984 (W.D.Pa. 1978).

In April, 1983, the inmates filed a motion seeking a rule to show cause why the County officials should not be held in contempt for failure to comply with earlier orders of the District Court.

After a hearing, the District Court dismissed the contempt rule but found that the jail was overcrowded and on May 25, 1983, entered an order requiring a staged reduction of the population in the County jail. *Inmates of the Allegheny County Jail v. Wecht*, 565 F.Supp. 1278 (W.D.Pa. 1983). A population limit of 540 inmates was set for the County jail.

Despite their best efforts, the County officials were unable to meet the population limit set by the May 25, 1983 order. To achieve the required reduction in the population, the District Court, on October 20, 1983, entered an

order providing a formula for the release of prisoners according to the amount of bond for which an inmate was being held. *Inmates of the Allegheny County Jail v. Wecht*, 573 F.Supp. 454 (W.D.Pa. 1983).

On December 30, 1983, the District Court ordered that the County officials pay a $5,000 per inmate sanction for each inmate released under the October 20, 1983 order. The December 20, 1983 order was vacated by the Third Circuit Court of Appeals and the case remanded to the District Court. *Inmates of the Allegheny County Jail v. Wecht*, 754 F.2d 120 (3d Cir. 1985).

On January 13, 1988, the District Court convened a hearing in order to determine whether the population at the County jail was exceeding the population limit. After hearing testimony from several witnesses, the District Court issued an order clarifying the method of taking the population count and denied two motions made by the County officials during the course of the hearing to increase the population limit. The District Court granted the County officials' motion to join the Commonwealth of Pennsylvania as an additional defendant.

On September 20, 1988, the County officials filed a motion to increase the population cap at the County jail. A hearing was held on October 13 and 14, 1988. On November 17, 1988, the District Court issued an opinion and order requiring, *inter alia*, the closing of the County jail and the submission of a plan for the construction of a new facility capable of housing 900 inmates. App. A.

The County officials appealed the November 17, 1988 order to the Third Circuit Court of Appeals. In a decision dated May 4, 1989, the Third Circuit affirmed the judgment of the District Court. The Court of Appeals held that

the provisions of the November 17, 1988 order were within the District Court's remedial authority. App. B.

On June 7, 1989, the Circuit Court denied the County officials' petition for rehearing before the court *in banc*. App. C.

REASONS FOR GRANTING THE WRIT

I. The decision of the Third Circuit affirming the District Court order requiring the closing of the Allegheny County jail and the submission of plans for the construction of a new jail is in conflict with this Court's decisions establishing the bounds limiting the exercise of remedial authority by the federal courts.

The controlling decisions of this Court establishing the bounds limiting the exercise of remedial authority by the federal courts have directed that federal courts proceed with caution and exercise judicial self-restraint in fashioning equitable relief against a state or local governemnt body to cure constitutional violations. There are inherent limitations on the power of federal courts which must be observed and adhered to in tailoring such equitable remedies. Out of these inherent limitations arises an obligation of the lower federal courts to craft equitable remedies against a state or local government body with sensitivity and care.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), marks the beginning of the painstaking development by this Court of a coherent set of equitable principles and limitations to guide the federal courts in their employment of equity's power against a state or local government body.

In *Swann*, the Court addressed the issue as to the scope of the equitable powers of the federal courts. The Court dictated that the scope of the equitable remedy was to be determined by the nature of the constitutional violation. *Id.* at 16.

The *Swann* Court expressed a strong reluctance to intrude into areas of local concern, such as a public school

system, yet upheld the District Court's far-reaching and highly intrusive desegregation remedy in the face of massive resistance on the part of state legislatures and school authorities to remedying the constitutional violation. Chief Justice Burger stated: "Judicial authority enters only when local authority defaults." *Swann*, 402 U.S. at 16. It was only after local authorities had been found wanting at the remedial stage that the Court had emphasized the breadth and flexibility of the District Court's equitable power.

In *Rizzo v. Goode*, 423 U.S. 362 (1976), this Court declared that the principles of federalism "which play such an important part in governing the relationship between federal courts and state governments" must be given appropriate consideration in determining the availability and scope of equitable relief. *Id.* at 379 (citations omitted). The Court cautioned the lower federal courts to be cognizant of "delicate issues of federal-state relationships" underlying cases where federal injunctive relief is sought against a state or local government body. *Id.* at 380 (citations omitted). The *Rizzo* Court stated that an adequate consideration of the principles of federalism would prevent excessive intervention in state or local government affairs by federal courts.

In *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), this Court remanded to the Circuit Court for reconsideration of a plan imposed by the District Court to cure public school racial segregation. The Court concluded that the remand was necessary in light of the enormous disparity between the evidence of constitutional violations and the sweeping remedy decreed. *Id.* at 419. The Court stressed that in the face of a constitutional violation, "a federal court is required to tailor the scope of the remedy

to fit the nature and extent of the constitutional violation." *Id.* at 419-20 (citations omitted). The federal courts are to impose the least intrusive remedy that will still be effective. *Id.*

In the decision in *Milliken v. Bradley*, 433 U.S. 267 (1977), Chief Justice Burger reaffirmed these limitations upon the equitable power of federal courts in fashioning equitable remedies against state and local government bodies. The scope of the equitable remedy is to be determined by the nature of the constitutional violation. *Id.* at 280 (citations omitted). A court can order only relief sufficient to correct the violation found. Therefore, an equitable remedy will be considered overly broad if the federal court could have taken other, less intrusive, action.

Additionally, in devising a remedy, the federal courts must take into account the interests of state and local authorities in managing their own affairs. *Id.* at 280-81. This guiding principle of federalism and comity towards the states calls for minimum intrusion by federal courts into the affairs of state and local governments.

The decisions of the District Court and the Third Circuit have moved beyond the well-established bounds limiting the exercise of remedial authority by the federal courts. Both opinions cited *Swann, supra,* for the principle that a federal court's equitable powers to remedy past wrongs is broad. However, both opinions failed to note that the *Swann* court was reluctant to uphold what it deemed to be a broad, intrusive remedy imposed by the District Court, and did so only in the face of massive resistance by the local authorities to remedying the constitutional violation. In light of the steps taken by the County officials to remedy

the unconstitutional conditions at the County jail, the primary justification for such a broad, sweeping remedy as in *Swann* is lacking in this case.

The County officials have undertaken extensive efforts to improve the conditions and reduce the population at the County jail. At a cost well in excess of $10 million the County officials constructed an auxiliary jail facility housing 435 inmates. They also authorized and constructed a 25-bed group home for female offenders, and converted an old post office facility into a housing facility for 25 non-violent offenders. A house arrest program was set up for non-violent offenders, and jail cells in neighboring counties have been rented. In order to improve the County jail's medical procedures, the County officials authorized an Ad Hoc committee and in response to the committee's recommendations they have contracted with a private firm to assume control of medical procedures and implement the committee's recommendations. The County officials have not been wanting at the remedial stage.

Contrary to *Milliken, supra,* the scope of the remedy imposed by the District Court, and affirmed by the Third Circuit, is not commensurate with the nature of the unconstitutional conditions existing at the County jail. The remedy imposed goes beyond the constitutional violations found. Both the District Court opinion and the Third Circuit opinion cited *Miller v. Carson,* 563 F.2d 741 (5th Cir. 1977), for the principle that when the totality of conditions in a jail violates the Constitution, a federal court need not confine itself to the elimination of specific conditions. This is contrary to this Court's directives in *Milliken* that a federal court can order only relief sufficient to correct the constitutional violations found, and that an order will be

considered overly broad when there are other less intrusive ways of eliminating the unconstitutional conditions.

The unconstitutional conditions of confinement as determined by the District Court consisted of overcrowding, insufficient and under-qualified staff, fire hazards and low quality of medical and psychiatric care. *Inmates of the Allegheny County Jail v. Wecht*, 699 F.Supp. 1137, 1147 (W.D.Pa. 1988) (App. A at 24a). Based on these conditions, which the District Court determined to be non-remedial, the closing of the County jail and the submission of a plan for construction of a new jail were ordered. The District Court, under *Swann* and its progeny, was limited to ordering the correction of the specific unconstitutional conditions of confinement. The District Court should have limited the scope of its order to requiring the reduction of overcrowding, the addition of suitably qualified staff, the elimination of fire hazards, and the improvement of the quality of medical and psychiatric care. Such an order would be proper in scope, less intrusive, well-tailored to the violations found, and within the bounds of the District Court's remedial authority under *Swann* and its progeny.

Contrary to *Milliken, supra,* and *Rizzo, supra,* the District Court failed to adequately consider the interests of the County officials in managing their own affairs, and the dictates of federalism, when it fashioned its equitable remedy. This Court stated in *Hutto v. Finney*, 437 U.S. 678, 688, n.9 (1978), that state and local authorities have the primary responsibility for curing constitutional violations. It is the federal court's responsibility to identify the unconstitutional conditions of confinement and to order their correction. Once identified, the details of compliance in correcting the constitutional violations are to be left to state and local officials. *Id.* It is in the interests of the

County officials in managing their own affairs that they should make the tough decisions on how to bring the County jail up to constitutional standards. The District Court and the Third Circuit both failed to adequately consider this interest of the County officials and have closed the door to other less intrusive remedies that would still be effective.

Further, the District Court and the Third Circuit have failed to adequately consider the principles of federalism and, as a result, have usurped the taxing power of state and county officials by ordering, in effect, the construction of a new jail requiring the appropriation and expenditure of a considerable sum of taxpayer funds. Such a decision is to be made by state and local elected officials through the political process, not by judicial decree. The District Court is trying to use a power that it does not, and should not, have.

In sum, the failure of the District Court and the Third Circuit to stay within the clearly-defined bounds limiting the exercise of remedial authority by the federal courts has resulted in a decision in conflict with the controlling decisions of this Honorable Court. Because of this conflict, this petition for a writ of certiorari should be granted.

II. The Third Circuit's decision has created a conflict among the Circuit Courts of Appeal regarding the scope of equitable relief which may properly be ordered in bringing state and local government correctional institutions up to constitutional standards under the Eighth and Fourteenth Amendments.

There has been considerable litigation over the scope of equitable relief which may properly be ordered in bringing state and local government correctional institutions up to constitutional standards under the Eighth and Fourteenth Amendments. The uncertainty concerning the proper scope of equitable relief centers around the issue of whether it is within the remedial authority of the federal courts to order government officials to appropriate and expend public funds for the construction of a new jail.

It is clear that the District Court's order in this case calls for the construction of a new jail which will require the appropriation and expenditure of a considerable sum of public funds. Although the Third Circuit held that the County officials were not limited to the construction of a new jail in complying with the District Court order requiring the submission of a plan for a "new facility", the requirement that the "new facility" house roughly twice the number of inmates in the existing jail, in conjunction with the requirement that the existing jail be closed, leaves the County officials no other viable alternative than to construct a new jail. To conclude otherwise is to place form over substance.

Other District Courts and Circuit Courts of Appeal have held that an order requiring the construction of a new jail is beyond the remedial authority of the federal courts and amounts to an usurpation of the taxing power of local officials.

In *Reece v. Gragg*, 650 F.Supp. 1297 (D.Kan. 1986), a class action under 42 U.S.C. §1983 was brought on behalf of jail inmates and pretrial detainees seeking injunctive relief requiring operation of the Sedgwick county jail under present conditions cease. The District Court found certain conditions in the jail to be unconstitutional. *Id.* at 1299.

In considering the remedy to be imposed the District Court noted:

> The Court does not have the power to order legislative appropriations for jail construction.

Id. at 1306. The District Court further noted:

> Even if this Court could order a new jail built,it would not do so. A decision such as that is a decision to be made by the political process, not by judicial fiat.

Id. The District Court limited its remedial order to requiring that the Sedgwick county officials submit a plan to bring the existing jail into compliance with constitutional minima. *Id.* at 1307.

The Seventh Circuit in *Jordan v. Wolke*, 593 F.2d 772 (7th Cir. 1978), reversed a District Court injunction mandating that jail authorities make certain changes to a county jail, including the construction of facilities for contact visitation, on the ground that the injunction would require the expenditure of an unknown sum of money. *Id.* at 774-75. The Seventh Circuit concluded that the matter of cost should be carefully considered when a Court fashions an affirmative remedy for unconstitutional conditions. In reaching its conclusion the Seventh Circuit noted:

> The courts may not order a state public body to appropriate monies for prison reform. The authorities are

> given two options, to operate the jail constitutionally or not at all.

Id. (citations omitted).

The Sixth Circuit in *Jones v. Wittenburg*, 330 F.Supp. 707 (1971), *aff'd* 456 F.2d 854 (6th Cir. 1972), affirmed the District Court which held that an order requiring county officials to construct a new jail would be beyond the remedial authority of the federal courts. The District Court stated:

> [I]n order to build a new jail, the Public must provide additional funds. This Court has no power whatsoever to require the public to do so. Under our system of government, the ultimate source of power is the people. The people have not given this Court any taxing power, or any control over the use of the taxing power.

Id. at 712. The District Court ordered that less intrusive remedial steps be taken, including upgrading the physical condition of the jail and changes in the operation of the jail.

The Third Circuit's decision is in direct conflict with the decisions of the Kansas District Court, the Sixth Circuit and the Seventh Circuit. The District Court order in this case was not limited to ordering the discontinuation of the unconstitutional act, i.e. the operation of the County jail under unconstitutional conditions. The District Court imposed the highly intrusive remedy of requiring the expenditure of public funds for the construction of a new jail under the threat of its contempt powers. The Third Circuit's decision affirming the District Court order creates a conflict among the circuits regarding the scope of equitable relief which may properly be ordered in bringing state

and local government correctional institutions up to constitutional standards. Because of this conflict among the various circuits, this Honorable Court should grant the Petitioner's prayer for a writ of certiorari to resolve this conflict.

Conclusion

For the foregoing reasons, it is respectfully prayed that the County officials' petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: September 5, 1989

APPENDIX A

OPINION AND ORDER OF THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INMATES OF THE ALLEGHENY COUNTY JAIL, THOMAS PRICE BEY, ARTHUR GOSLEE, ROBERT MALONEY, and CALVIN MILLIGAN on their own behalf and on behalf of all others similarly situated,
Plaintiffs,

v.

CYRIL H. WECHT, President of the Allegheny County Board of Prison Inspectors and the other members of the Board: THOMAS FOERSTER and WILLIAM H. HUNT, Commissioners for Allegheny County; FRANK J. LUCCHINO, Controller for Allegheny County, EUGENE COON, Sheriff for Allegheny County; THE HONORABLE PATRICK R. TAMILIA, MICHAEL J. O'MALLEY and MARION K. FINKELHOR, Judges Court of Common Pleas of Allegheny County; RICHARD S. CALIGUIRI, Mayor of the City of Pittsburgh; HARRIET McCRAY; MONSG. CHARLES OWEN RICE and CHARLES KOZAKIEWICZ, Warden of the Allegheny County Jail, and WILLIAM B. ROBINSON, Executive Director of Prison Inspectors, and CYRIL WECHT, THOMAS FOERSTER and WILLIAM H. HUNT, as Commissioners of Allegheny County,
Defendants.

v.

COMMONWEALTH OF PENNSYLVANIA
Third-Party Defendant.

Civil Action 76-743

OPINION

COHILL, C.J.

Findings of Fact and Conclusions of Law

Presently before the Court are (1) plaintiffs' Motion for Sanctions, (2) defendants' Motion to Increase Population Cap at the Allegheny County Jail, and (3) third-party defendant's Motion to Dismiss. The recurring issue permeating this case is whether the inmates in the custody of defendant County of Allegheny, et al., ("County") are being housed under constitutionally adequate conditions. For the reasons set forth below, we will grant plaintiffs' Motion for Sanctions, conditionally grant defendant's Motion to Increase Population Cap, and deny third-party defendant's Motion to Dismiss.

Following a hearing on October 13 and 14, 1988, and a tour of the Allegheny County Jail ("Jail") and Jail Annex ("Annex") on October 13, 1988, we now make the following findings of fact and conclusions of law.

I. Findings of Fact

With respect to the motions presently before the Court, we are generally considering only the old main facility, or Jail. The Annex, which was opened in 1986, and which can house up to 435 inmates, is at capacity but not unconstitutionally overcrowded. The Annex appears to be operating smoothly with the exception of difficulties related to female inmates suffering mental health problems. (*See infra* p. 10).

The Jail is a 102-year-old structure, used for every conceivable function related to the County's criminal justice system. It is a pretrial detention center housing unconvicted persons awaiting trial; unfortunately it must also

serve as a detention unit for convicted state and federal prisoners awaiting sentencing, assignment or transfer to other institutions; it is also a prison for convicted state prisoners serving sentences of up to 23 months and for County prisoners convicted of misdemeanors who are serving short sentences. A number of inmates are in a work-release program. These are primarily fathers who have disobeyed child-support orders. They are housed in the Jail at night but are permitted to work at their own jobs during the day. The facility additionally houses prisoners brought to the Jail from other institutions to testify in federal or state trials. Only male inmates are housed in the Jail. All females are in the Annex.

The County attempted, through a law suit, to force the Commonwealth to house all convicted state prisoners in state facilities, but the Supreme Court of Pennsylvania ruled that the Commonwealth need not take prisoners whose sentences were less than twenty-three months. *See County of Allegheny v. Commonwealth of Pennsylvania*, 544 A.2d 1305 (Pa. 1988).

Although the Jail is orderly and clean, it is no longer constitutionally adequate. While superficially in good physical condition, considering its age, the structure falls far short of meeting contemporary standards. Conditions are a vast improvement over what they were when this case began in 1976. (See this Court's description of those conditions in *Owens-El v. Robinson*, 442 F.Supp. 1368 (1978)). However, there have been no structural changes made to the Jail to create additional bed space or to facilitate other activities at the Jail.

The housing structure of the Jail consists of the North, East, and West Blocks, two Mental Health sections, a Receiving Unit, and a Disciplinary Housing Unit. A total

of 610 cells in the Jail are currently available for inmate housing.

The North Block consists of 47 cells which are 8′ deep × 5′ wide × 8′ 10″ high (40 sq. ft.).

The East Block consists of 250 cells which are 7′ 8½″ deep × 6′ wide × 8′ 1½″ high (46.25 sq. ft.). Ten of these cells are used as mop rooms, one a supply room and one a nurse's station; thus, 238 cells remain for inmate housing.

The West Block consists of 210 cells which are 7′ 8½″ deep × 6′ wide × 9′ ¾″ high (46.25 sq. ft.). Like the East Block, ten of these cells are mop rooms, one a supply room and one a nurse's station; thus, 198 cells remain for inmate housing.

The two Mental Health units each have 20 cells which are 8′ 10½″ deep × 7′ 1½″ high (63.2 sq. ft.).

The Receiving Section has 63 cells. Twelve are used as mental health cells for new admissions. Each of these cells is 7′ 7½″ × 6′ 1½″ × 8′ 1″ high (46.7 sq. ft.).

Three ranges of cells comprise the Disciplinary Housing Unit. The "A" range has 8 cells which are 10′ 10″ deep × 6′ wide × 8′ 1″ high (65 sq. ft.). The "B" range has 7 cells which are 9′ 11″ deep × 6′ 6″ wide × 8′ 1″ high (64.4 sq. ft.). The "E" range consists of 9 cells which are 7′ 9″ deep × 6′ 6″ wide × 8′ 1″ high (50 sq. ft.). Inmates are double-celled in 6 "B" range cells and in 5 "E" range cells. Thus, there are 30 bed spaces in that unit.

Every cell contains a sink with push button cold water, a seatless toilet, and mattress suspended from chains.

The gymnasium measures 45′ 10″ × 63′. This is the only large open area in the main facility. Although a court

yard is available to the inmates, no real outdoor exercise facility exists. The Jail also contains a hospital room measuring 19′ × 31′ 6″.

On any given day, approximately 20 cells are "down"—inoperable and unavailable for inmate housing. An additional 20 cells in the East and West Blocks have been converted into storage facilities or "mop rooms" for cleaning and maintenance equipment. The County seeks to convert these back to cells by removing the mop sinks and installing cots, wash basins and toilet facilities. This is where 20 of the requested 40 additional inmates would be housed.

The average daily inmate population in the main facility was 429 in 1976. By 1983 it had increased to 644. When this case was filed in 1976, the litigation focused on conditions at the Jail. Overcrowding was not a problem until 1983.

Pursuant to this Court's Order of February 28, 1985, we held that the maximum constitutional inmate population was 540 inmates. The number of inmates housed in the main facility is not to exceed that number after 5:00 p.m. on any day.

The County has violated that Order. The population limitation up to the date of the hearing has been exceeded as follows (inmates remaining at 5:00 p.m. in main facility after release of inmates per this Court's Orders of February 28, 1985 and of February 9, 1988):

8/27/88 — 567 inmates (27 over limit)
8/28/88 — 574 inmates (34 over limit)
8/29/88 — 545 inmates (5 over limit)
10/8/88 — 559 inmates (19 over limit)

10/9/88 — 567 inmates (27 over limit)
10/10/88 — 569 inmates (29 over limit)

These figures do not include persons received for incarceration after 5:00 p.m. on the noted days. Such commitments substantially increase the inmate population on a regular basis.

Recently the Population Control Manager resigned. This vacancy exacerbates the logistical problems of coordinating the inmate population. This position had been created by the County following the institution of this action. The person filling it was, according to the Warden, of great assistance in expediting releases, obtaining alternate housing and holding the prisoner population within the cap set by the Court.

Rarely does the main facility house fewer than 540 inmates at a time. If the number drops below 540, the occurrence is only temporary.

The population at the Jail is constantly in a state of flux. We had previously arbitrarily determined that, for purposes of the Court order, the population count should occur at 5:00 p.m. At this time work-release prisoners should have reported back, permitting jail personnel to determine the population. Problems arise, of course, when, although the population is 540 at 5:00 p.m., police later bring in more prisoners or pretrial detainees.

In the future the physical demands on the structure are only going to multiply. The population of the main facility will continue to grow through the year 2000. The Kimball Report[1], commissioned by the County and issued

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[1]L. Robert Kimball & Associates, *Allegheny County Criminal Systems Facility Report Feasibility Report* (1985) (commonly known as the "Kimball Report.")

in 1985, recommended that the County have facilities to house 1,095 inmates by 1990 and 1,339 inmates by the year 2000. These projections appear to be low, since even today the average daily population at the Jail alone would approximate 620 inmates if no releases occurred. When this is added to the 435 inmates housed in the Annex the total is 1055. At the hearing on this matter on October 13, 1988, an expert in demographics, Hunter Hurst, testified that the County will require a total jail capacity for 1300 inmates by 1995 and 1400 inmates by the year 2000.

The County has attempted to meet the problems but with only partial success. In 1986 the County opened the newly constructed Annex, a block from the Jail, to house 435 prisioners. The County also obtained a facility for approximately 25 non-violent offenders. This is a former post office in Homestead, Pennsylvania, which is not yet open. The County is investigating a facility in New Brighton, Beaver County, Pennsylvania, for housing non-violent offenders and considering converting the 13th floor storage area at the Annex into additional housing for 16 inmates. Currently in very early planning stages, these latter two possibilities are at best tentative and, if completed, will not put such of a dent in the problem. The County has also commenced an electronically monitored House Arrest Program. As of October 14, 1988, 31 prisoners were being confined to their home under the program.

These stop-gap measures are not sufficient to handle the present requirements of the County, let alone future needs stemming from the large projected increases in inmate population. Other conditions at the Jail indicate its inadequacy to serve as a constitutionally adequate institution for prisioners.

The old, unreliable, unsafe heating plant is totally inadequate. The system breaks down regularly each winter. The master locking systems, which allow prison personnel to lock or unlock a complete row of cells at one time, do not work properly. This deficiency creates an obvious danger in the event of fire.

The ductwork lacks smoke or fire detectors that would effect an automatic shutdown should a fire occur. Smoke, delivering toxic products through the return air ductwork, would cause a hazardous condition throughout most areas of the Jail. The Jail lacks a sprinkler system. On our latest inspection no emergency evacuation plan was posted. We note that this Court's Order of October 11, 1978 required such a plan. *See* Item 29 of that Order.

Due in large part to the lack of adequate space the quality of the physical and mental health care provided to inmates is deteriorating.

The County does not provide for or require psychiatric training for its nursing staff, nor must applicants for nursing positions have psychiatric nursing backgrounds. One third of the normal complement of eighteen nursing positions is vacant. An insufficient number of full-time nurses remain available at the Jail. We note that the deficiency in psychiatric nursing services violates this Court's Order of May 15, 1983. *See* Item 11.

The beds in the Jail's mental health unit are regularly filled to capacity. The Jail does not provide a nurse to cover the Mental Health Unit on a full-time basis during the 11:00 p.m. to 7:00 a.m. shifts and 3:00 p.m. to 11:00 p.m. shifts. This also violates this Court's Order of May 25, 1983. *See* Item 11.

Once a mentally ill inmate has been legally determined to be a danger to himself or to others delays of up to 30 days precede an actual transfer to a state psychiatric facility. Additional delay in transferring seriously mentally ill inmates for necessary care and treatment is at least partially attributable to a lack of accreditation for the Mental Health Unit. Because the Jail itself is not accredited, the psychiatric staff must first refer a seriously ill inmate to the Allegheny County Behavior Clinic for commitment proceedings.

The female mental health personnel log indicates that a psychiatrist visited the female mental health cells only 12 times over a 67-day period from August 1, 1988 through October 6, 1988. We note that this omission applies to the Annex, the only facility where female inmates are held.

In 1986, the County formed an Ad Hoc Committee on Jail Medical Procedures, chaired by Gilbert A. Friday, M.D. The purpose of the Committee was to recommend improvements to Jail medical procedures.

The Committee recommended, *inter alia*, the implementation of continuing education opportunities for all mental health personnel, the hiring of additional and better qualified nurses, the training of the nursing and physician staff in emergency medical care, and increasing the availability of psychiatric services to inmates. *See The Roport of the Allegheny County Jail Ad Hoc Committee on Jail Medical Procedures,* 9-16 (April 2, 1987).

In response to the Committee's report, the County is currently negotiating a contract with Correctional Medical Services ("CMS") of St. Louis, Missouri, to operate medical services at the Jail. The County expects a final arrangement with CMS soon, with the objective that CMS will

implement the Committee's recommendations by January 1, 1989.

II. Conclusion of Law

The defendants have committed and condoned serious violations of various orders of this Court. We are disturbed particularly that the population caps were violated, not by negligence or mistake but consciously and with full knowledge that this Court's orders were being violated. The County made no effort to come back to the court to seek relief.

The courts don't operate in a vacuum. At the trial level we "see the bodies," whether they be civil litigants, criminal defendants, victims of crime or inmates of the Allegheny County Jail. Since our first visit to the Jail in 1977 we have been well aware of the problems, not only of the inmates but those of County officials. We have written reams of opinions and orders on the subject.[2]

Throughout this twelve-year period, this Court has attempted to use restraint by not superimposing on the County Commissioners what this judge thinks needs to be done; they, after all, are the duly-elected representatives of the citizens of this County.

Rather than ordering that a new jail be built, we imposed a population cap on the original jail facility. This resulted in the Annex being constructed. As noted in the

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[2]*Inmates of Allegheny County Jail v. Wecht, et al.*, 612 F.Supp. 874 (W.D. Pa. 1985); 573 F.Supp. 454 (W.D. Pa. 1983); 565 F.Supp. 1278 (W.D. Pa. 1983); *Inmates of Allegheny County Jail v. Peirce*, 487 F.Supp. 638 (W.D. Pa. 1980); *Owens-El v. Robinson*, 457 F.Supp. 984 (W.D. Pa. 1978); 442 F.Supp. 1368 (W.D. Pa. 1978). The foregoing are only the published opinions; we have also written many unpublished orders and memoranda.

Findings of Fact above, the average daily population in the Jail was 429 in 1976. In 1983, it had jumped to 644. On one day that we toured the jail (May 5, 1983), it was 705.

Again, setting the cap was not done precipitously. We ordered a population reduction in steps beginning on July 1, 1983 and giving the County until January 1, 1984 to reduce the jail population to 530. By Order of February 28, 1985, we increased the cap to 540 but also ordered the County to obtain additional facilities for prisoners over the cap or release them and be fined for releasing them. The County released many prisoners and piled up about 2 million dollars in fines. It also built the Annex, and we then agreed to forgive the fines.

Now we are back to square one; even though the Annex can house 435 prisoners, the County has again started releasing prisoners in some cases and in others has simply violated this Court's orders.

Judges often have to go through what are called "balancing tests" by the lawyers. In a criminal trial, for example, if an item of evidence is technically admissible, the judge must decide whether the possible unfair prejudice to the defendant outweighs the probative value (proof) of that evidence. A typical example is whether or not to let the jury know about a prior conviction of the defendant.

Well, in this case the time has come for another kind of balancing test. The prisoners are not entitled to a country club or hotel, but they are entitled to be housed in constitutionally humane conditions. The County is obliged to provide such conditions. But the County also has an obligation to its citizens to protect them from dangerous people.

In complying with the population cap, the County released pretrial detainees on "own recognizance" or "OR" bonds. These came to be known as "Cohill bonds" as a result of this Court's Orders. While it must be kept in mind that prisoners released on so-called "Cohill bonds" have not been convicted of anything and would have been released anyway if they had been able to "make" their bonds, nevertheless having a judge be responsible for wholesale releases rather than utilizing the deliberate judicial process for each case as provided by the law is simply a distortion of the law. The problem has now been compounded by the Warden deliberately violating our orders which set the population cap.

This method of operating can't continue indefinitely. The balance now tips in favor of protection of the citizens; the County cannot postpone the inevitable; it must provide adequate facilities for all of its prisoners. We conclude today that the Jail is no longer constitutionally adequate.

The main facility houses not only convicted inmates but pretrial detainees who are only accused of crimes. Pretrial detainees have due process rights under the fifth and fourteenth amendments and are entitled to non-punishing jail conditions. *Bell vs. Wolfish,* 441 U.S. 520, 535 (1979). Pretrial detainees may not be held under punitive conditions, because they are still cloaked with the presumption of innocence. *Reese v. Gragg,* 650 F.Supp. 1297, 1300 (D. Kan. 1986). Sentenced inmates may be held under conditions that are punitive, as long as the punishment is not incompatible with societal standards of decency and does not constitute cruel and unusual punishment. *Id.* However, where a correctional facility, such as the Jail, houses both types of inmates and does not segregate them, non-punishing conditions must be provided.

Overcrowding becomes punishment when it "subjects a detainee over an extended period to genuine privations and hardship not reasonably related to a legitimate governmental objective." *Lareau v. Manson*, 651 F.2d 96, 103 (2d Cir. 1981). All inmates are entitled to protection from an environment where degeneration is probable and self-improvement is unlikely because of conditions which inflict needless physical or mental suffering. *Capps v. Atiyeh*, 495 F.Supp. 802, 813 (D. Ore. 1980).

Our inquiry, then, is whether the totality of conditions "deprives inmates of the minimum civilized measures of life's necessities." *Rhoades v. Chapman*, 452 U.S. 337, 346 (1981). We find that the totality of conditions at the Jail, including the lack of adequate living space for inmates, the deplorable mental health facilities, fire hazards and the lack of reliable climate control, deprive inmates of the minimum necessities of life. The Jail is therefore a constitutionally inadequate facility.

While no consensus among courts exists regarding the minimum number of square feet that should be provided to an inmate, courts recognize that the fifth (due process), eighth (cruel and unusual punishment), and fourteenth (also due process) amendments demand some minimum, and our review of the cases indicates that the figure is 60 to 70 square feet per cell.

In *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977), the Tenth Circuit Court of Appeals adopted the 60 square feet standard set by the American Public Health Association noting that "[m]inimum space to call one's own is a primary psychological necessity. Without the basic minimums prisons are doomed to failure, with both society and the inmates incarcerated therein the losers."

The institution that the *Battle* court examined housed convicted sentenced inmates but not pretrial detainees.

Other courts have attempted to set a constitutional minimum as to the amount of square feet to be provided each inmate. *See Ahrens v. Thomas,* 434 F.Supp. 873, 901 (W.D. Mo. 1977) (70 sq. ft. min.); *Anderson v. Redman,* 429 F.Supp. 1105, 1119 (D.Del. 1977) (60 sq. ft. min.); *Pugh v. Locke,* 406 F.Supp. 318, 334 (M.D. Ala. 1976). *aff'd,* 559 F.2d 283 (5th Cir. 1977) (60 sq. ft. min.).

The American Correctional Association ("ACA") provides "current standards deemed appropriate by detention facility managers and recognized organizations representing corrections." ACA, *Standards for Adult Local Detention Facilities,* xiii (2d ed. 1981). With respect to living space, the ACA recommends that "[a]ll single rooms or cells in detention facilities have at least 60 square feet of floor space, provided inmates spend no more than 10 hours per day locked in; when confinement exceeds 10 hours per day, there are at least 70 square feet of floor space." *Id.,* standard 2-5111. Discussing this standard, the ACA notes that "[a]dequate living space is important to the mental well-being of the inmate. Rooms or cells of sufficient size enable inmates to personalize living space consistent with facility rules and regulations." *Id.*

The National Clearinghouse for Criminal Justice Planning and Architecture recommends 70 square feet per inmate. The National Advisory Commission on Criminal Justice Standards and Goals recommends 80 square feet per inmate. The American Institute of Architects recommends 70 square feet per inmate.

While these recommendations, suggesting that inmates be provided with between 60 and 80 square feet of

living space, do not establish constitutional minima, and are certainly not binding on this Court, they do provide guidance.

The living space provided to inmates in the main facility at the Jail does not even approach these recommendations. Cells in the North Block provide only 40 square feet of space. Cells in the East and West Blocks provide only 46.25 square feet of space. Cells in the Receiving Section provide only 46.7 square feet. While the cells in the Disciplinary Housing Unit provide between 50 and 65 square feet of space, many of these house two prisoners. These figures are all floor space dimensions and include floor areas which are covered by desks, bedding, and toilets.

These cells are simply too small to provide humane living conditions to inmates. It is evident that the Jail facility was constructed over 100 years ago solely for the purpose of locking people up and, with the passage of time, no longer meets community standards of humane treatment. While they may have been sufficient in 1886, they are clearly not tolerable in 1988.

Not only are the cells physically inadequate, but there is no way for this structure to be made adequate. In the past several months, the inmate population has regularly exceeded 540. Officials at the main facility are forced to handle an increasing number of individuals whether on a temporary or a permanent basis. Moreover, we are really just beginning to feel the effects of an ever increasing jail population. The overcrowding problem is not going to go away; as the testimony and evidence of record indicate, the situation will only get worse.

Overcrowding not only affects the physical housing of inmates, but the totality of the adequacy of their confinement. Areas for physical recreation are wholly inadequate for the number of inmates who seek recreation. The only areas available for the recreation of 540 plus inmates is the gymnasium which measures 45′ 10″ × 63′, and a small court yard.

The physical limitations of the structure also affect the quality of other necessities of life such as the food service, the ability to shower, counseling, medical services and the myriad other activities necessary in a jail. Even without the current problem of overcrowding, we find that the Jail is now constitutionally inadequate.

The health services provided to inmates are wholly inadequate; this is not merely an administrative problem but one compounded by the lack of adequate space.

Currently, the Jail contains 40 mental health cells, 20 located in the Summary I unit on one floor and 20 located in the Summary II unit on another floor. An additional 12 cells are available on the "B" range in the general population to accommodate the overflow of mentally ill patients. All of the beds available to the mental health unit are regularly filled to capacity.

If mentally ill inmates are to be housed at the Jail, the professional staff must have adequate space, equipment and supplies. The American Medical Association sets three conditions that must be met if psychiatric treatment is to be provided at a jail: (1) a safe, sanitary, humane environment as required by sanitation, safety and health codes of the jurisdiction, (2) adequate staffing, security to inhibit suicide and assault (i.e. staff within sight and sound of all mentally ill inmates), and (3) trained personnel to provide

treatment and close observation. American Medical Association, *Standards for Health Services in Jails,* at 10 (1981).

Failure to provide adequate treatment is a violation of the eighth amendment's prohibition against cruel and unusual punishment when it results from "deliberate indifference" to a prisoner's serious medical needs. *Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754, 762 (3d Cir. 1979) (citing *Estelle v. Gamble,* 429 U.S. 97, 105 (1976)). At a minimum, the deliberate indifference standard must be met as to pretrial detainees. *Id.* at 762. In evaluating medical care, the "deliberate indifference" standard applies to both convicted prisoners and pretrial detainees. *Boring v. Kozakiewicz,* 833 F.2d 468, 472 (3d Cir. 1987), *cert. denied,* 108 S.Ct. 1298 (1988). In other words the same level of medical care is required for both types of inmates.

Psychological or psychiatric care provided at a jail is constitutionally inadequate if inmates with serious mental illnesses are denied reasonable access to personnel qualified to diagnose and treat those illnesses. *Inmates,* 612 F.2d at 765.

The confined space at the Jail prohibits the construction and operation of constitutionally adequate mental health facilities. There is simply not enough room in the existing mental health units to house those inmates needing psychiatric care. During hearings conducted by this Court in April, 1980, the evidence established that a minimum of 10% and a maximum of 30% of the inmates in the Jail could be considered to be seriously mentally ill. As Warden Kozakiewicz testified at the hearing before this Court on October 13 and 14, 1988, many prisoners in the main population would be housed in the mental health units but for the lack of space.

The Ad Hoc Committee recognized the enormity of this problem in its April 2, 1987 report. The Committee noted the "physical limitations to a building erected a hundred years ago." It stated that more mental health space should be a high priority. Plaintiff's Exhibit 2, at 5-7. The Committee recommended that, since the County Engineering Department had determined that combining the two summary units would be prohibitively costly and impractical, a totally new site for a larger Mental Health Unit should be considered. *Id.* at 11.

The lack of space for adequate mental health units complicates the County's problem in attracting and retaining qualified nursing personnel to staff the units. Qualified nurses, consistent with their oaths to provide an acceptable level of nursing care, may well find practicing in the current jail environment a violation of those oaths.

We note particularly the deficiency in nursing service for mentally ill inmates who must, out of necessity, be housed with the general population. With respect to these inmates, for whose health the nurse accepts responsibility, she must depend upon security personnel, rather than her own experienced observations, to identify and alert her to the inmate's need for care. We applaud the efforts of the nurses now working at the Jail. However, because sparse nursing services must be spread among the three mental health units and even beyond those units into the general population, inmates with serious mental illnesses are denied access to personnel qualified to diagnose and treat those illnesses. Therefore, current conditions amount to a constitutional violation. *See Inmates,* 612 F.2d at 765. Moreover, after twelve years of trying, it is apparent that the County is unable to provide constitutionally acceptable psychiatric care in this antiquated jail.

The Jail cannot handle the demands required of a modern jail facility. Neither can it meet the needs of this County's criminal justice system in the next decade. The totality of conditions in the Jail amount to unconstitutional punishment and violate the rights of the inmates housed there.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971). Moreover, lack of financing is not a defense to the failure of a county to provide minimum constitutional standards in its operation of a county jail. *Battle v. Anderson,* 447 F.Supp. 516, 526 (E.D. Ok. 1977).

This Court is fully aware of the judicial restraint which federal courts must exercise in attempting to remedy constitutional violations in a correctional institution. We have respect for the allocation of functions in our federal system and for comity towards the County and the Commonwealth. To that end, we have attempted to exercise control over the last twelve years by fashioning what we deem to be conservative relief consistent with the policy of minimum intrusion into the affairs of the County's prison administration. However, it is now apparent that these measures were ineffective; the time has come to implement more stringent remedies. *See Ruiz v. Estelle,* 679 F.2d 1115, 1145-46 (5th Cir. 1982) ("Conservative treatment is essential because it is more readily administered, less costly to the state, and not irreversible . . . If these measures later prove ineffective, more stringent ones should be considered."), *cert. denied,* 460 U.S. 1042 (1983).

Courts have reacted to unconstitutional jail conditions in various ways. To deal with the physical condition of prisons, some courts have ordered extensive structural improvements, such as requiring a minimum number of square feet to be assigned to each prisoner for living space. *See Newman v. Alabama,* 559 F.2d 283, 288 (5th Cir. 1977); *Gates v. Collier,* 501 F.2d 1291, 1303 (5th Cir. 1974). Similarly, to deal with constitutionally inadequate mental and physical health care, at least one court ordered the construction of a new prison hospital. *Hamilton v. Landrieu,* 351 F.Supp. 549, 550 (E.D. La. 1972). Finally, when no physical reconstruction efforts could improve a jail so as to meet constitutional standards, the United States Court of Appeals for the Second Circuit determined that the appropriate remedy was to close the old jail and transfer the prisoners to another facility. *Rhem v. Malcolm,* 507 F.2d 333, 340 (2d Cir. 1974).

This Jail can no longer physically handle the burdens placed on it by the criminal justice system in Allegheny County. The Warden and his staff have made valiant efforts to keep the Jail clean and in repair. These attempts affect the structure only superficially. As a jail, time has passed this building by. While we have attempted less intrusive remedies with the population cap and release orders, they were unfortunately ineffective short term solutions. We have no choice now but to order that more stringent measures be taken.

Although apparently three courts have refused to order a county to build a new jail, such refusal was based primarily on the fact that such a remedy would not have solved the constitutional violations found in their cases. *See Madison County Jail Inmates v. Robert Baldwin, et al.,* No. IP 79-675-C (S.D. Ind. 1980) (LEXIS Genfed library,

Dist file); *Padgett v. Stein,* 406 F.Supp. 287, 303 (M.D. Pa. 1975); *Jones v. Wittenberg,* 330 F.Supp. 707, 712 (N.D. Ohio 1971).

In *Jones,* the United States District Court for the Northern District of Ohio determined that the problem with the county jail was not its physical structure, but the archaic policies and attitudes of the public officials operating it. *Id.* at 712. Therefore, the court determined that requiring construction of a new jail would be broader than necessary to remedy the constitutional violations. The court also believed that it had no authority to compel such a remedy. *Id.*

While we recognize the concerns expressed by these courts, the situation before us presents an additional dilemma not confronting those courts. Despite all of our efforts and orders over the last 12 years, the County has been unable to provide constitutionally adequate housing in this institution.

The problem with the Jail is that it is a fortress-like stone structure to which additional floor space cannot be added. Those same physical inadequacies prevent the County from remodeling it to meet constitutional standards, while at the same time accommodating current and future population demands.

We have determined that the conditions existing at the main facility are inadequate under the Constitution of the United States. There is no qustion that we may require the County to comply with the Constitution and provide constitutional housing to inmates.

The plaintiffs have presented substantial evidence of long existing and continuing constitutional violations at the main facility. Severe overcrowding, inadequate cell

size, inadequate staffing and the insufficient medical and psychiatric services do not provide even minimally adequate care. These conditions can no longer be tolerated.

When the totality of conditions in a penal institution violates the Constitution, the trial court's remedies are not limited to the redress of specific constitutional rights. *Miller v. Carson,* 563 F.2d 741, 751 (5th Cir. 1977). Rather, the nature of the violation determines the scope of the remedy. *Swann,* 402 U.S. at 16. Moreover, in fashioning a remedy for constitutional violations, federal courts must order full and effective relief. *Smith v. Sullivan,* 611 F.2d 1039, 1044 (5th Cir. 1980). The fact that a remedy is costly does not preclude a district court from ordering that remedy. *Toussaint v. McCarthy,* 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied,* 107 S.Ct. 2462 (1987).

We believe that construction of a new jail and/or some alternative facility to provide constitutional inmate housing is required to eliminate continuing constitutional violations produced by the deplorable jail conditions long maintained by the County.

While the Court recognizes that the Pennsylvania Supreme Court held in *County of Allegheny v. Commonwealth of Pennsylvania,* 544 A.2d 1305, 1308 (Pa. 1988), that state prisoners who are sentenced to less than two years confinement are properly in the custody of the County absent a proclamation from the Governor making state facilities available, the Court does not agree that the Commonwealth of Pennsylvania should be dismissed from this action.

If the conditions at the Jail violate the Constitution of the United States due to overcrowding and the Commonwealth has contributed to those conditions by availing

itself of the Jail, we fail to see why the Commonwealth should be absolved from partial responsibility for such conditions. This Court has supreme federal equitable power to remedy unconstitutional confinement conditions. Accordingly, the Commonwealth's Motion to Dismiss will be denied.

III. CONCLUSION

It has become increasingly clear that the Jail cannot be brought into the latter 20th century, let alone the 21st. Despite the heroic efforts of its staff, the physical facility itself is not capable of providing adequate housing for current and projected populations.

This Court has no choice other than to order that the Jail be closed. Recognizing that a new facility cannot be constructed nor alternate housing be located overnight but also realizing that the County's own consultants long ago recognized the space problems at the Jail, we will enter an Order that no prisoners shall be housed at the main jail after June 30, 1990.

The defendants shall submit to the Court a plan for construction of a new facility or alternate housing, accommodating at least 900 inmates, within six months of the date of this Order. For each month thereafter that such plan has not been filed, defendants will be fined a sum to be determined.

In the interim, and as a temporary measure only, we will grant in part the County's petition to house additional inmates in the Jail. Since it has been established that there are 20 additional cells in the main jail which have never been counted as cells in this litigation because of their conversion to utility rooms, our Order will permit inmates

to be housed in those rooms as soon as they can be reconverted to cells to the Warden's satisfaction and that of the Court Monitor. In addition, it appears that constant maintenance has reduced the number of "down" or malfunctioning cells. To the extent that the Warden can keep the number of "down" cells to a minimum, he may house up to an additional 20 inmates in the Jail if habitable operational cells are available.

We believe that these allowances will not seriously impair the functioning of the jail since the additional inmates will be spread throughout the institution. However, to insure that there will be no strain, these additional inmates will be permitted *only* if (1) the position of Population Control Officer at the jail is filled and (2) the Jail remains in substantial compliance with the prior orders of this Court relative to conditions.

Because the defendants have repeatedly violated earlier Orders of this Court relative to population and medical care without seeking permission of the Court, we believe that financial sanctions are warranted and will grant the plaintiffs' petition in part.

The defendants will be fined $25,000 for failure to comply with this Court's orders. The same fine will be imposed for each month in the future that applicable limits are exceeded. These finds will be payable immediately upon a violation of this Court's orders relative to the population count.

An appropriate Order will issue.

/s/ MAURICE B. COHILL, JR.
Chief Judge

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INMATES OF THE ALLEGHENY COUNTY JAIL, THOMAS PRICE BEY, ARTHUR GOSLEE, ROBERT MALONEY, and CALVIN MILLIGAN on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

CYRIL H. WECHT, President of the Allegheny County Board of Prison Inspectors and the other members of the Board: THOMAS FOERSTER and WILLIAM H. HUNT, Commissioners for Allegheny County; FRANK J. LUCCHINO, Controller for Allegheny County, EUGENE COON, Sheriff for Allegheny County; THE HONORABLE PATRICK R. TAMILIA, MICHAEL J. O'MALLEY and MARION K. FINKELHOR, Judges Court of Common Pleas of Allegheny County; RICHARD S. CALIGUIRI, Mayor of the City of Pittsburgh; HARRIET McCRAY; MONSG. CHARLES OWEN RICE and CHARLES KOZAKIEWICZ, Warden of the Allegheny County Jail, and WILLIAM B. ROBINSON, Executive Director of Prison Inspectors, and CYRIL WECHT, THOMAS FOERSTER and WILLIAM H. HUNT, as Commissioners of Allegheny County,

Defendants.

v.

COMMONWEALTH OF PENNSYLVANIA

Third-Party Defendant.

Civil Action 76-743

ORDER

AND NOW, to-wit, this 17th day of November, 1988, for the reasons stated in the foregoing Opinion, it is ORDERED, ADJUDGED, and DECREED that:

1. no inmates shall be housed in the main facility of the Allegheny County Jail after June 30, 1990;

2. on or before May 1, 1989, the County shall submit to the Court a plan for construction of a new facility or alternative housing, accommodating at least 900 inmates, not counting the 435 inmates housed in the Jail Annex.

3. the County's Motion to Increase Population Cap be and hereby is conditionally GRANTED. The County may house unmates in the 20 utility room areas in the Jail if, in the opinion of the Court Monitor, these are converted to habitable cells. The County may further house up to an additional 20 inmates in the Jail to the extent that the Warden can keep the number of inoperable cells to a minimum. Said population increases may be made *only* if (1) the position of Population Control Officer at the Jail is filled, and (2) in the opinion of the Court Monitor the Jail remains in substantial compliance with the prior Orders of this Court relative to conditions.

4. plaintiffs' Motion for Sanctions be and hereby is GRANTED. The County is Ordered to pay a fine in the amount of $25,000 to the Clerk of Court on or before Friday, December 2, 1988;

5. third-party Defendant's Motion to Dismiss be and hereby is DENIED.

/s/ MAURICE B. COHILL, JR.

Chief Judge

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APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 88-3820, 88-3871

INMATES OF THE ALLEGHENY COUNTY JAIL, THOMAS PRICE BEY, ARTHUR GOSLEE, ROBERT MALONEY, and CALVIN MILLIGAN on their own behalf and on bahalf of all others similarly situated,

Plaintiffs/Appellees,

v.

CYRIL H. WECHT, President of the Allegheny County Board of Prison Inspectors, and the other members of the board; THOMAS FOERSTER and WILLIAM H. HUNT, Commissioners for Allegheny County; FRANK J. LUCCHINO, Controller for Allegheny County; EUGENE COON, Sheriff for Allegheny County; THE HONORABLE PATRICK R. TAMILIA, MICHAEL J. O'MALLEY, and MARION K. FINKELHOR, Judges, Court of Common Pleas of Allegheny County; RICHARD S. CALIGUIRI, Mayor of the City of Pittsburgh; HARRIET McCRAY; MSGR. CHARLES OWEN RICE, and CHARLES KOZAKIEWICZ, Warden of the Allegheny County Jail; and WILLIAM B. ROBINSON, Executive Director of Prison Inspectors; and CYRIL WECHT, THOMAS FOERSTER and WILLIAM H. HUNT, as Commissioners of Allegheny County,

Defendants/Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE COMMONWEATH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS; DAVID S. OWENS, JR., Commissioner, Department of Corrections, and ERSKIND DERAMUS, Deputy Commissioner, Department of Corrections.

Third Party Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
U.S.D.C. NO. 76-743

Argued: April 3, 1989

Before: GIBBONS, *Chief Judge,* BECKER and NYGAARD *Circuit Judges*

(Opinion Filed: May 4, 1989)

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OPINION OF THE COURT

GIBBONS, *Chief Judge:*

Once more, and undoubtedly not for the last time, we are presented with an appeal by officials of Allegheny County from an order of the district court in the thirteen year old dispute over unconstitutional conditions of confinement at the Allegheny County Jail. To the extent that

the order appealed from, dated December 20, 1988, is appealable, we will affirm.

I. Prior Proceedings

The Allegheny County Jail in Pittsburgh, Pennsylvania was erected in 1886. At the time of its construction the population of the County was approximately 450,000. (The U.S. Census reported 355,869 residents in 1880 and 551,959 in 1890). The 1983 population was 1,385,558. In 1886 the County had six Common Pleas Judges; now forty-five judges sit there. The jail was designed, in connection with the county courthouse, by the great architect Henry Hobson Richardson. In 1976 the jail was placed on the National Register of Historic Places. Its recognition as an historic landmark, however, coincided with the commencement of this class action on behalf of past, present, and future inmates, for in 1976 a complaint was filed alleging that conditions in Richardson's grim fortress violated their Fifth, Eighth, and Fourteenth Amendment rights.

On January 4, 1978, after a six week trial, the district court held that conditions in the jail violated the constitution in many respects. *Owens-El v. Robinson,* 457 F. Supp. 984 (W.D. Pa. 1978). The county defendants did not appeal. The class representatives did, however, and this court remanded for consideration of changes in the decree necessary to upgrade the psychological treatment facilities in the jail to the constitutional minimum. *Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754 (3d Cir. 1979).

On remand, after a five week trial, the district court found that the level of care for mentally ill inmates amounted to deliberate and unconstitutional indifference. The court also found that the county officials were not in full compliance with the October 11, 1978 decree. The

court ordered such compliance as well as additional steps to bring treatment of the mentally ill inmates up to constitutional minimum standards. *Inmates of Allegheny County Jail v. Pierce,* 487 F. Supp. 638 (W.D. Pa. 1980). No appeal was taken from this judgment.

During the seventies overcrowding in the jail had not become an issue, and was not addressed in the initial class action. The average daily inmate population in 1975 was only 429, and the court in 1978 observed in passing that "[o]vercrowding of the institution is not a problem." *Owens-El v. Robinson,* 442 F. Supp. 1368, 1376 (W.D. Pa. 1978). By April of 1983, however, the average daily population had risen to 690, and as a consequence jail conditions seriously deteriorated. That month the class representatives obtained an order directing the county officials to show cause why they should not be held in contempt for non-compliance with the court's prior orders, and moved for additional relief. On May 25, 1983, after a six day hearing, the district court found that the maximum constitutional capacity of the facility was 475-500 males in the main unit, 63 males in the receiving unit, and 38 females in the female section; an upper limit of 575-600. The court found 705 inmates in the jail on the day he toured it, and found:

> *The jail is now dangerously overcrowded. Fires and prisoner unrest are an ever-present danger in any penal setting. Here they could result in disaster. The Allegheny County Jail is a catastrophe waiting to happen.*

Inmates of Allegheny County Jail v. Wecht, 565 F. Supp. 1278, 1281 (W.D. Pa. 1983). (emphasis in original). By order of May 25, 1983 the court ordered phased reductions of the jail population as follows:

a. After July 1, 1983, there shall be no more than 650 male and 60 female inmates housed in the jail;

b. After August 15, there shall be no more than 600 male and 50 female inmates housed in the jail;

c. After October 1, 1983 there shall be no more than 550 male and 40 female inmates housed in the jail;

d. After January 1, 1984 there shall be no more than 500 male and 30 female inmates housed in the jail.

No appeal was taken from the May 25, 1983 order.

By October 20, 1983 it was clear that the county authorities were not meeting the population cap, and the court addressed their August 4 and September 30 motions for upward modification. Finding that the dangerously overcrowded conditions in the jail were just as serious as on May 25, 1983, the court ordered the release of those prisoners held in the lowest amount of bail until the population limits of the May 25 order were met. The court made it clear that the release remedy was a temporary expedient, noting:

> It is the duty of the County to house prisoners, and any release of prisoners as a result of this order should be recognized as final, albeit temporary, effort to ameliorate the situation, not as a solution to the problem.

Inmates of Allegheny County Jail v. Wecht, 573 F. Supp. 454, 457 (W.D. Pa. 1983). No appeal was taken from the October 20, 1983 order.

By late December 1983, 14 males and 12 females had been released, and it became clear to the district court that

no permanent solution was in the offing. To provide an incentive for such a solution the court ordered "that after February 15, 1984, a sanction of $5,000 against the defendants for each prisoner released under the court's order of October 20, 1983" would be assessed. Thereafter the court denied the request of the county authorities to increase the population cap as well as a request to house some inmates temporarily in a trailer within the jail compound. Finding heating problems, fire hazards, and lack of constitutionally required support services the court reaffirmed the population caps in the October 20, 1983 order. The county authorities appealed from the denial of their request to raise the population caps, and from the $5,000 sanction order.

This court, on January 29, 1985 affirmed the order reconfirming the population caps. We reluctantly vacated the contempt sanctions, reasoning that the county officials could not be held in contempt for failure to develop substitute jail facilities because the court's previous orders were not sufficiently explicit to satisfy Fed. R. Civ. P. 65(d). *Inmates of Allegheny County Jail v. Wecht,* 754 F.2d 120, 127-30 (3d Cir. 1985). We made it clear, however, that the district court had the power to order production of such a plan, observing:

> Orders to responsible public officials to prepare and submit plans for remedying constitutional violations are not uncommon. Such orders often issue in the school desegregation context.
>
> Similarly, in the prisoner contexts the courts have authority to order local officials to take costly measures to cure constitutional violations.

754 F.2d at 128 n.5 (citations omitted).

On remand the district court after a hearing on February 20, 1985 ordered the county officials "to appraise the court as to . . . [p]lans for alternate facilities in order to prevent the further release of prisoner." The court indicated that [i]f no plan is presented, the court will order further appropriate action at that time." *Inmates of Allegheny County Jail v. Wecht,* 612 F. Supp. 874, 877 (W.D. Pa. 1985). A week later, the court after a hearing determined that although the county was then in compliance with the cap "the measures taken by the county continued to be, in essence, a stopgap approach to a serious and continuing problem." *Id. a*t 877-78. The court ordered that the county have adequate facilities in place by May 6, 1985 or be subject to a $5,000 contempt fine for each prisoner released. When the county failed to meet this deadline, contempt fines were commenced. The county authorities appealed from the order directing that they develop a plan for new facilities, and from the order imposing fines.

Before these appeals were heard, the district court was forced to deal with a new mode of evasion. In a hearing on a motion by the class representatives for further relief it was revealed that the county was complying with the population cap by refusing to admit inmates committed to jail. As a result, committed inmates were being detained in local police lockups not designed for overnight use. Finding the practice unconstitutional the district court enjoined it, and ordered the county to accept any prisoner committed to jail before spending more than twelve hours in police lock-ups. *Inmates of Allegheny County Jail v. Pierce,* 612 F. Supp. at 878-84. The county officials likewise appealed from this order.

The appeals from the orders directing preparation of a plan, imposing the contempt fines, and prohibiting overnight use of police lockups, were never addressed in this court. Faced with mounting fines the county some time in 1985 commissioned a study entitled *Allegheny County Criminal Systems Facilities Report,* by a firm called L. Robert Kimball & Associates which recommended against attempting to renovate the historic jail. In June of 1986 the county had managed to complete a jail annex, in a converted office building a block away, with 274 cells capable of housing 435 inmates double-celled. By then fines against the county for releasing prisoners to comply with the population cap totaled $2,090,000. The county requested this court to remand, while retaining jurisdiction, for the purpose of implementing an amicable settlement. We did so on May 19, 1986.

As part of that settlement the district court remitted the $2,090,000 in fines. In the order to that effect, however, the court stated:

> [s]uffice it to say that following the 1986-77 hearings, court inspections, and the involvement of court-appointed monitors, conditions at the Allegheny County Jail did improve, but it was still an antiquated 100-year-old facility.
>
> * * *
>
> The new auxiliary jail appears to be an excellent facility. We are particularly concerned, however, about the condition of the old jail. The Warden and his personnel are doing the best they can at this point in a very old and decrepit building. *A study should be made to determine whether it is better to continue the old jail as*

a jail, or to build elsewhere and convert the jail building to another use. This should be done now, not after another crisis.

Memorandum Order, June 2, 1986 at 2, 4(emphasis supplied). The court noted the statutory duties of the Allegheny County Prison Board under state law, 61 Pa. Stat. Ann. § 407.1 *et seq.* and concluded that "our review today of what the Allegheny Prison Board is required by law to do is intended to give fair warning for the future." *Id.* at 6. The parties then entered into a stipulation providing that

1. All prior orders would continue except as modified by the stipulation.

2. The Annex would operate at full capacity by July 31, 1986.

3. The capacity of the Annex would be 274 inmates single celled, 435 double celled.

4. No double celling would be permitted unless inmates were allowed 12 hours outside the cells.

5. All female inmates would be housed in the Annex.

6. The mental health unit in the jail would be doubled to 40 beds, with appropriate modifications and services.

7. Six cells in the female unit in the Annex would be set aside for mental health problems.

8. The jail officials would submit a progress report after one year.

9. The male population cap in the old jail would be increased to 540 when the Annex was at full capacity and the former female section in the old jail thus made available for males.

10. The county would pay counsel fees to the attorneys for the plaintiff class.

11. Court costs would be paid by the county.

12. The pending appeals would be dismissed.

Stipulation, June 4, 1986. On June 11, 1986 this court, pursuant to the stipulation, dismissed the county's consolidated appeals.

The truce embodied in the June 4, 1986 stipulation proved to be, like the Lebanese variety, of short duration. By January of 1988 the county authorities were back in the district court seeking and order lifting the population caps, while the class representatives moved for sanctions and additional relief on account of the deteriorating condition of the old jail and overcrowding in the Annex. On February 9, 1988 the court found that there had been chronic violations of the population caps at both facilities. Memorandum Order, February 9, 1988 at 2,3.

Noting that the conditions in both facilities violated the stipulation at least, if not the constitution, the court nevertheless denied the class representatives' motion while the county sought through litigation in the Pennsylvania courts to have the Commonwealth take some sentenced prisoners off its hands. On July 28, 1988 the Pennsylvania Supreme Court rejected the county's effort to move prisoners to state facilities. *Allegheny County v. Commonwealth,* 518 Pa. 556, 544 A.2d 1305 (1988).

With no relief in sight from the Commonwealth, a further hearing was held in the district court on October 13, and 14, 1988. That hearing produced the November 17, 1988 order appealed from. That order provides in relevant part:

1. no inmates shall be housed in the main facility of the Allegheny County Jail after June 30, 1990;

2. on or before May 1, 1989, the county shall submit to the court a plan for construction of a new facility or alternative housing, accommodating at least 900 inmates, not counting the 435 inmates housed in the Jail Annex.

3. the county's Motion to Increase Population Cap be and hereby is conditionally GRANTED. The county may house inmates in the 20 utility room areas in the Jail if, in the opinion of the Court Monitor, these are converted to habitable cells. The county may further house up to an additional 20 inmates in the Jail to the extent that the Warden can keep the number of inoperable cells to a minimum. Said population increases may be made *only* if (1) the position of Population Control Officer at the Jail is filled, and (2) in the opinion of the Court Monitor the Jail remains in substantial compliance with the prior orders of this court relative to conditions.

4. plaintiff's Motion for Sanctions be and hereby is GRANTED. The county is ordered to pay a fine in the amount of $25,000 to the Clerk of Court on or before Friday, December 2, 1988.

The county officials appeal from paragraphs 1, 2, and 4. We address each paragraph, although not in the same order.

II. The Contempt Sanction

This court has appellate jurisdiction over the order imposing a contempt sanction for prior violations of the district court's injunction because that order is a final judgment. 28 U.S.C. § 1291. *Commonwealth of Pennsylvania v. Local Union No. 542, International Union of Operating*

Engineers, 552 F.2d 498 (3d Cir. 1977), *cert. denied sub nom, Freedman v. Higginbotham,* 434 U.S. 822 (1977).

The scope of review is limited to these questions: did the order give fair notice, was the contempt hearing procedurally proper, did contemnors violate the order, and was compliance with the order physically possible. The validity of the underlying order is not open to consideration. *Halderman v. Pennhurst State School & Hospital,* 673 F.2d 628, 636-37 (3d Cir. 1982) *cert. denied,* 465 U.S. 1028 (1984).

The court imposed a $25,000 fine, payable to the Clerk of Court on or before Friday, December 2, 1988. When the fine was not paid on that date the court imposed an additional fine of $5,000. The $25,000 fine was imposed because the county officials failed to comply with several provisions of prior orders, including inmate population caps in the May 4, 1984, and February 25, 1985 orders, the requirement for trained psychiatric nurses in the October 11, 1978 order, the requirement of one guard and one nurse for each shift in the Mental Health unit, in the April 17, 1980 order, and the requirement that there be sufficient nursing staff so that one nurse will be present in the Mental Health unit at all times, in the May 25, 1985 order.

The county officials do not contend that these orders did not give fair notice of the conduct they prescribed or proscribed. Compare *Inmates of Allegheny County v. Wecht,* 754 F.2d at 127-30. Nor do they contend that the contempt hearing was procedurally irregular. Nor do they dispute that the orders were not complied with in the specific respects noted by the district court. Their sole contention is that they were unable to comply. In advancing this contention they rely on *United States v. Bryan,* 339 U.S. 323, 330-31 (1950). The *Bryan* defense of inability to comply, however, refers to physical impossibility beyond the

control of the alleged contemnor. The orders in question were directed to all the defendants, and the suggestion that it was physically impossible for Allegheny County to obey the order in the respects inwhich they were held to be in contempt is sophistical. The county officials simply chose to take no steps to provide the Warden and his staff with the wherewithal to comply. Such conduct exposes the party responsible to contempt. *Pennhurst State School & Hospital,* 673 F.2d at 639.

Alternatively, the county contends that the fine was not a proper civil contempt remedy since it is not remedial. See *Ramos Colon v. U.S. Attorney for the District of Puerto Rico,* 576 F.2d 1 (1st Cir. 1978). That argument is no more persuasive than the county's reliance on the defense of impossibility. More was at stake than merely vindicating the dignity and authority of the court. The orders which were disobeyed are still in place, and the district court imposed the fines for the clear purpose of deterring their violation in the future.

The orders imposing a $25,000 and $5,000 fine for violations of outstanding injunctions will therefore be affirmed.

III. The Jail Closing Order

As noted above, the November 17, 1988 order provides that "no inmates shall be housed in the main facility of the Allegheny County Jail after June 30, 1990." This order modifies a prior injunction, which permitted use of the old jail subject to a population cap and other limits. It is therefore appealable under 28 U.S.C. § 1292(a)(1). We review the district court's findings of fact in support of the modification of the injunction by the clearly erroneous standard of Fed. R. Civ. P. 52. If those findings disclose a

constitutional violation, our review of the district court's remedial order turns on whether the court committed a clear abuse of discretion. *See e.g., Hodge v. Hodge,* 621 F.2d 590, 593 (3d Cir. 1980). When the totality of conditions in a jail violates the Constitution a district court need not confine itself to the elimination of specific conditions. *Miller v. Carson,* 563 F.2d 741, 751 (5th Cir. 1977). Rather, the nature of the overall violation determines the permissible scope of an effective remedy. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, (1971). A remedy cannot, however, go beyond the constitutional violations found. *Milliken v. Bradley,* 433 U.S. 267, 280-81 *(Milliken II)* (1977).

The district court determined that inevitable and unavoidable conditions at the old jail violate the constitution now, and will do so to a greater extent in the future. If the court applied the proper legal standard and its findings are not clearly erroneous in these respects, the order requiring that the jail not be used to house inmates is an appropriate remedy. *Jordan v. Wolke,* 593 F.2d 772, 775 (7th Cir. 1978); *Rhem v. Malcolm,* 507 F.2d 333, 341 n.19 (2d Cir. 1974).

The old jail currently houses both pretrial detainees and convicted prisoners, and they are not segregated. Pretrial detainees retain the presumption of innocence, and may not be held in conditions amounting to punishment. *Bell v. Wolfish,* 441 U.S. 520 (1979). Sentenced inmates may be held in punitive conditions as long as those conditions do not fall below Eighth Amendment standards for punishment. *Rhodes v. Chapman,* 452 U.S. 337, 344-45 (1981); *Trop v. Dulles,* 356 U.S. 86, 101 (1958). Where both convicted inmates and pretrial detainees are housed

together the higher standard applicable under the due process clause should govern their common condition. *E.g., Reece v. Gragg,* 650 F. Supp. 1297, 1300 (D. Kans. 1986). Here, however, the district court applied the cruel and unusual punishment standard of *Bell,* 441 U.S. at 542 and *Rhodes,* 452 U.S. at 344-45. Thus, the district court measured the defendants' constitutional obligation by the standard applicable to the sentenced inmates. Certainly, therefore, the county officials cannot contend that the court abused its discretion with respect to the applicable legal standard.

Turning to the facts, the district court relied on several factors in support of the finding that the old jail is inherently constitutionally inadequate. The court deemed lack of space for adequate mental health care the most grievous problem. The American Medical Association has set forth three prerequisites for adequate psychiatric care in a penal institution: (1) a safe sanitary environment; (2) adequate staffing and security to prevent assault and suicide; and (3) trained personnel for treatment and close observation. AMA *Standards for Health Services in Jails,* at 10 (1981). This court has already held that a denial of access to personnel qualified to diagnose and treat mental illness is a constitutional violation. *Inmates of Allegheny County,* 612 F.2d at 765. The court found that "[t]he confined space at the jail prohibits the construction of constitutionally adequate mental health facilities." (A. 20). This finding is not clearly erroneous. The record established in 1980 10% to 30% of the jail population could be considered seriously mentally ill. The record does not disclose any improvement in inmate mental health. The 40 mental health cells, along with 12 overflow cells, are regularly filled to capacity. The mental health facility is understaffed, lack of space

hampers the recruitment of qualified nurses, and the county's own Ad Hoc Committee on Jail Medical Procedures noted the "physical limitations to the building erected a hundred years ago." (A. 20). The district court found that the confined space in the jail prohibits construction and operation of constitutionally adequate mental health facilities.

The district court also found other unremediable physical limitations. Chief among these is an antiquated heating system, the ductwork for which would channel smoke and noxious fumes throughout the cells in case of a fire. The building lacks a sprinkler system, and contains faulty electrical wiring. The central cellblock unlocking system chronically breaks down, exposing inmates to the prospect of being trapped in cells in the event of a fire. The gymnasium, measuring 45′ 10″ × 63′, furnishes the only exercise area in the facility. Food service, access to showers, and access to counseling, all suffer because of the jail's age, size and deteriorating condition.

On top of these seriously hazardous conditions the district court found that there was the persistent problem of overcrowding. This court has already noted that such overcrowding may be unconstitutionally punitive. *Inmates of Allegheny County Jail,* 754 F.2d at 127. See also *Lareau v. Manson,* 651 F.2d 961, 103 (2d Cir. 1981); *Rhem,* 507 F.2d at 342. The county argues that overcrowding as a constitutional violation can be remedied by imposing a population cap. The district court's experience with such a cap, however has amply demonstrated that it has not been an effective remedy for the several constitutional violations previously adjudicated. Moreover, the county's own study by L. Robert Kimball & Associates (A. 559-94) describes numerous interrelated structural and operational

problems in the old jail and recommends against renovation as both costly and ineffective. Finally, the district court noting the projection in the Kimball Report of the need to house 1095 inmates by the year 1990 and 1339 inmates by the year 2000, observed:

> These projections appear to be low, since even today the average daily population at the Jail alone would approximate 620 inmates if no releases occurred. When this is added to the 435 inmates housed in the Annex the total is 1055. At the hearing on this matter on October 13, 1988, an expert in demographics, Hunter Hurst, testified that the county will require a total jail capacity for 1300 inmates by 1995 and 1400 inmates by the year 2000. (A. 63)

Besides the general problem of overcrowding, the court noted that as designed in 1886 the floor space in each cell falls far short of the minimums recommended as psychologically necessary by the American Public Health Association, and as penologically necessary by The American Correctional Association. The court found that the cells are simply too small to provide humane living conditions, and that there is no way for the structure to be made adequate. (A. 73)

One response made by the county officials to these well supported findings of fact is to suggest that they cannot be credited because at one point in this protracted litigation the district court, after an inspection on February 5, 1988, observed that the old jail appeared to be "in good physical condition and operating smoothly; a vast improvement from the conditions that existed in 1976." (A. 21). The memorandum opinion containing this observation, complimentary to the Warden, expressly refrained

from determining whether conditions in the old jail violated the constitution, and set the matter down for an evidentiary hearing. Thus the reference to the court's observation about improved conditions has no relevance to the findings made after that evidentiary hearing took place.

The record response made by the county officials to the court's well supported findings is to point to testimony of Lynette Watson the court appointed jail monitor that the old jail is "neat . . . [and] . . . clean" (A. 400, 402-03, 406). The court monitor's testimony, however, taken in context, refers only to matters of sanitation and lighting. It does not address the issues of structural defects, cell space, fire hazards, inadequate mental health facilities, and overcrowding. The court monitor did comment on ventilation, but qualified her observations by noting that she checked only "those things that one could check by visual inspection and by asking questions." Other evidence in the record amply supports the district court's findings of unconstitutional conditions.

Since the court's findings of fact with respect to the totality of conditions at the old jail are not clearly erroneous, and it applied the Eighth Amendment standard in determining the constitutionality of those conditions, we cannot hold that the order directing that the county cease housing inmates in that facility was an abuse of discretion. The county officials' last desperate argument, that the order should have been made, if at all, years ago, is not supported either by logic or by authority. Other pressing problems existed and were addressed at the outset of the litigation. The overcrowding which has developed since entirely changed the remedial posture of the case.

The order that "no inmates shall be housed in the main facility of the Allegheny County Jail after June 30, 1990" will therefore be affirmed.

IV. The Order to Prepare a Plan

The county officials seek to appeal from the direction in the November 17, 1988 order that by May 1, 1989 they "shall submit to the court a plan for construction of a new facility or alternative housing, accommodating at least 900 inmates not counting the 435 inmates housed in the Jail Annex. That effort presents a question of appellate jurisdiction. The order does not qualify as a final judgment within the meaning of 28 U.S.C. § 1291. An order to submit a remedial plan that contemplates further action by the court is by definition not final. *Hoots v. Pennsylvania,* 587 F.2d 1340, 1347 (3d Cir. 1978). Authority for our review of the plan order, therefore, is conferred, if at all, by 28 U.S.C. § 1292(a)(1). The county officials urge that we have such authority. The class representatives contend that we do not.

An order appealable as an injunction under section 1291(a)(1) must:

> adjudicate some of the relief sought in the complaint . . . [and] . . . must also be of such nature that if it grants relief it could be enforced *pendente lite* by contempt if necessary.

Cohen v. Board of Trustees of the University of Medicine and Dentistry of New Jersey, 867 F.2d 1455, 1465 (3d Cir. 1989). There is no question that the order to produce a plan is one which will be enforced by contempt. Indeed the district court, in the opinion accompanying the order, informed the county that for each month after may, 1989 that a plan is not filed the defendants will be fined a

sum to be determined. (A. 20). Thus one of the two section 1292(a)(1) requirements is satisfied. The more problematical question is whether the order adjudicates some of the relief sought in the complaint.

In deciding this more problematical question in the context of a suit addressed at remedying unconstitutional conditions this court and others have focused on whether a plan order (1) is inseparable from the rest of an order that is clearly an appealable injunctive order, or (2) specifies the nature and content of the plan to be submitted. *Hoots,* 587 F.2d at 1349; *Hendrickson v. Griggs,* 856 F.2d 1041, 1044 (8th Cir. 1988). We conclude that the instant plan order satisfies neither requirement.

The plan order is unquestionably separable from the contempt order. The county officials do not contend otherwise. They contend, rather, that the plan order is inseparable from the order closing the old jail. We conclude otherwise. The court's findings as to future inmate population establish the need for additional inmate capacity whether or not the old jail continues in use. The constitutionally adequate annex accommodates 435 inmates, and the constitutionally inadequate old jail 540; far short of the projected inmate population. Thus a plan for additional housing is required even if the old jail were to be continued in use. The plan order thus can be considered apart from the shutdown order. The shutdown order is not conditioned on court approval of any plan which may be submitted. The two orders are separable. See *Frederick L. v. Thomas,* 557 F.2d 373 380-81 (3d Cir. 1977).

Appealability must rest, then, on whether the order specifies the nature and content of the plan sufficiently to be more than a step toward selection of a remedy, among several possible, for the constitutional violations

addressed. We conclude that the order is not sufficiently specific. The plan order does require a significant practical step toward the selection of an ultimate remedy. In that respect it is analogous to a discovery order, which though significant and enforceable by contempt, is not reviewable under section 1292(a)(1). *Metex Corp. v. ACS Industries*, 748 F.2d 150, 156 (3d Cir. 1984). The plan order accords inmates none of the relief requested. Until it is approved by the court it will have no effect on the unconstitutional conditions of which the class representatives complain. The only specific requirement of the plan order is that it provide housing for 900 inmates. The county is free to propose half-way houses, work release centers, minimum security facilities, traditional jail facilities, one facility or several, or any combination of the aforesaid. Whether the county's proposal will be deemed by the court an adequate response to the constitutional violations it has found remains to be seen.

We hold, therefore, that the appeal by the county officials from the order directing them to prepare an inmate housing plan by May 1, 1989 must be dismissed.

V. Conclusion

The orders directing the county to pay $30,000 in contempt fines will be affirmed. The order modifying the injunction to provide that the Allegheny County Jail may not be used to house prisoners after June 30, 1990 will be affirmed. The appeal from the order requiring the county officials to present to the court a plan for housing 900 inmates no later than May 1, 1989 will be dismissed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 88-3866

INMATES OF THE ALLEGHENY COUNTY JAIL, et al.,
Appellees
v.
CYRIL H. WECHT, et al.
Appellees
v.
COMMONWEALTH OF PENNSYLVANIA, et al.,
Appellants
(W.D. of Pa. D.C. Civil No. 76-743)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN and NYGAARD, Circuit Judges

The petition for rehearing filed by the Commonwealth in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN J. GIBBONS

Chief Judge